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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

April 29, 2003

The Honorable Darrell Jackson
Senator, District No. 21
612 Gressette Building
Columbia, South Carolina 29202

Dear Senator Jackson:

You have asked this Office to review S.203 for constitutionality. S.203 is a Bill which would establish the South Carolina Higher Education Equalization Program. The purpose of the program is to require the Commission on Higher Education to enter into contracts with eligible institutions in order to enhance the educational opportunities of low-income, educationally disadvantaged students. Lottery funds would be used to fund this program. Your specific question is whether S.203 could pass constitutional muster, particularly Article XI, § 4 of the South Carolina Constitution. Article XI, § 4 provides that "[n]o money shall be paid from public funds nor shall the credit of the State ... be used for the direct benefit of any religious or other private educational institution."

LAW / ANALYSIS

We begin with the legal proposition that "[i]t is always to be presumed that the Legislature acted in good faith and within constitutional limits ...." Scroggie v. Scarborough, 162 S.C. 218, 160 S.E. 596, 601 (1931). The General Assembly is "presumed to have acted within ... [its] constitutional power despite the fact that, in practice, ... [its] laws result in some inequality ...." State v. Solomon, 245 S.C. 550, 572, 141 S.E.2d 818 (1965).

Moreover, our Supreme Court has often recognized that the powers of the General Assembly are plenary, unlike those of the federal Congress, whose powers are enumerated. State ex rel. Thompson v. Seigler, 230 S.C. 115, 94 S.E.2d 231, 233 (1956). Accordingly, any act of the General Assembly must be presumed valid and constitutional. An act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland Co., 190 S.C. 270, 2 S.E.2d 779 (1939). Every doubt regarding the constitutionality of an act of the General Assembly must be resolved favorably to the statute's constitutional validity. More than anything else, only a court and not this Office, may strike down an act of the General Assembly as unconstitutional. While this Office may comment upon what we deem an apparent unconstitutionality, we may not declare the Act void. Put another way,

a statute "must continue to be followed until a court declares otherwise." Op. S.C. Atty. Gen., June 11, 1997.

In conjunction with the presumption of constitutionality which must be given every statute enacted by the General Assembly, it must also be noted that, if possible, a statute will be construed in a constitutional rather than an unconstitutional manner. Gardner v. S.C. Dept. of Revenue, 353 S.C. 1, 577 S.E.2d 190 (2003). As the Court instructed in Westvaco Corp. v. S.C. Dept. of Revenue, 321 S.C. 59, 467 S.E.2d 739 (1995), "[a] possible constitutional construction must prevail over an unconstitutional interpretation."

As noted above, Article XI, Section 4 of the South Carolina Constitution (1895 as amended) states that

> [n]o money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.

Recently, in an opinion dated January 7, 2003, we advised that this constitutional provision prohibited the General Assembly from appropriating three million dollars per year in lottery funds to be expended directly to South Carolina's historically black colleges for building maintenance and repair. Based upon the constitutional history and the plain language of Article XI, § 4, we found that "an appropriation to South Carolina's historically black colleges contravenes the State Constitution as a 'direct benefit' to 'private educational institutions.'" We further concluded that

> [t]he framers of the Constitution stated explicitly that the purpose of the constitutional provision [Art. XI, § 4] is to prohibit "public funds, [from being] granted outrightly to [private educational institutions]." On its face, this appropriation represents an outright grant of public funds to certain private colleges. No independent public purpose, consistent with Article XI, § 4 is suggested by the legislation.
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> Accordingly, it is our opinion that a court would find this appropriation to be prohibited by the South Carolina Constitution. (emphasis added).

The General Assembly made no findings in that legislation that the appropriation was intended primarily to benefit students as opposed to the institutions themselves. Without more, we could not conclude that the appropriation was anything other than a "direct benefit" to a private educational institution in contravention of Article XI, § 4.

Thus, the issue here is whether, in our opinion, S.203 would also contravene Article XI, § 4 or whether this Bill is constitutionally distinguishable from the legislation considered in our January 7,

2003 opinion. With the caveats set forth below, it is our opinion that S.203 is distinguishable and that a court would most probably uphold the Bill as constitutional.

S.203 creates the South Carolina Higher Education Excellence Enhancement Program as part of Chapter 77 of Title 2 of the Code of Laws of South Carolina. Section 2-77-10 makes a number of findings by the General Assembly as follows:

> (1) a significant part of the state mission in education has been to enhance excellence in higher education for low-income and educationally disadvantaged students;
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> (2) certain institutions have played a[n] integral role in offering higher educational access to low-income and educationally disadvantaged students who otherwise might not have been able to obtain a college education, which has resulted in a substantial public benefit;
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> (3) these institutions provide a unique educational opportunity for these targeted groups of students by offering flexible admission policies, low tuition rates, and small enrollments to ensure smaller class size tailored to the needs of these targeted students;
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> (4) these institutions are often limited in their abilities to raise funds from their respective student populations from tuition and fees because of the demographic profiles of their students and, as a result, charge tuition rates which on average are substantially lower than those charged by other higher educational institutions in this State;
>
> (5) the federal government has recognized the unique ability of certain institutions to accomplish the important public benefit of enhancing opportunities in higher education for low-income and educationally disadvantaged students;
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> (6) public educational assistance made available to the institutions that serve these targeted students provides a direct educational benefit to the students by improving the overall quality of their educational experiences by offering enhanced facilities and improved academic instructions; and
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> (7) it is necessary that the State of South Carolina enable these institutions to effectively partner with the federal government to ensure the continued existence in this State of these institutions, which provide a substantial public benefit to the State by enabling these targeted students to be well-educated, to move into the workforce, and to improve the quality of life in South Carolina.

Section 2-77-15 of the Bill defines certain terms for purposes of the legislation. The terms "eligible institution," "federal funding program," and "low income and educationally disadvantaged student" are specifically defined therein. An "eligible institution" is a four year institution of higher

learning at which "sixty percent or more of the enrolled undergraduate students are low-income and educationally disadvantaged students." A "low-income and educationally disadvantaged student" is defined as a student who "receives a Pell Grant." Pell Grants provide federal funding to low-income and educationally disadvantaged students to attend college pursuant to Chapter 28 of Title 20 of the United States Code. This source of federal funding is at least part of the "federal funding program" referenced in Section 2-77-15 of the legislation.

The Bill requires the Commission on Higher Education to administer the South Carolina Education Excellence Enhancement Program. Monies from the Education Lottery Account, in an amount to be determined by the General Assembly, provides the state funding mechanism. The Commission on Higher Education is authorized to contract with "eligible institutions," based upon application made to the Commission. The proposed Bill provides as follows:

> Section 2-77-20(A). (A) There is hereby established the South Carolina Higher Education Excellence Enhancement Program for the general purpose of enhancing the educational opportunities of low-income and educationally disadvantaged students. The program must be administered by the Commission on Higher Education. The commission must enter into annual contracts with eligible institutions to accomplish the purposes of this program.
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> (B) The program must be funded by appropriations from the Education Lottery Account in an amount provided by the General Assembly.
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> (C) An institution seeking to qualify as an eligible institution must submit an annual application to the commission. The commission must certify the eligibility of the institutions seeking contracts pursuant to this section. Of the funds appropriated for this program, one half must be allocated equally among the eligible institutions. The remainder of the appropriated funds shall be awarded to eligible institutions based upon merit, through criteria developed by the Commission on Higher Education.
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> (D) From the amounts allocated on an equal basis, an institution receiving an allocation of funds, must first use the funds as the nonfederal match required by a federal funding program that provides funding for historic preservation or for capital improvements. In awarding funds based on merit, the commission shall give priority to those proposals that can be matched with funds from a federal funding program. (emphasis added).

The specified purposes for which contracts may be awarded by the Commission are enumerated in § 2-77-30(A). These purposes are specified as follows:

(1) purchase, rental, or lease of scientific equipment for educational purposes, including instructional and research purposes;

(2) construction, maintenance, renovation, and improvement in classroom, library, laboratory, and other instructional facilities, including purchase or rental of telecommunications technology equipment or services;

(3) support of faculty exchanges, faculty development, and faculty fellowships to assist in attaining advanced degrees in their fields of instruction;

(4) purchase of library books, periodicals, microfilm, and other educational materials, including telecommunications program materials;

(5) tutoring, counseling, and student service programs designed to improve academic success;

(6) funds and administrative management and acquisition of equipment for use in strengthening funds management;

(7) joint use of facilities, such as laboratories and libraries;

(8) establishing or improving a development office to strengthen or improve contributions from alumni and the private sector;

(9) establishing or enhancing a program of teacher education designed to qualify students to teach in a public elementary or secondary school in the State that must include, as part of the program, preparation for teacher certification; and

(10) other activities proposed that contribute to carrying out the purposes of this act, and which are approved by the commission as part of the review and acceptance of the application.

While there is some ambiguity, as we read the proposed legislation, the General Assembly has limited in a number of ways the manner in which public funds may be received by private educational institutions as part of the South Carolina Higher Education Excellence Enhancement Program. First and foremost, the purpose of the Program, as stated in the Bill, is "enhancing the educational opportunities of low-income and educationally disadvantaged students" rather than providing a direct benefit to the private colleges and universities themselves.

Secondly, this overriding purpose must be used to interpret the statute, and any ambiguities therein. Accordingly, no money is to be granted outright to an private college or university as part of the Program. Instead, all monies must be provided only as part of a contract with the Commission

on Higher Education. Subsection 2-77-20(A) expressly states that "[t]he commission must enter into annual contracts with eligible institutions to accomplish the purposes of this program." Subsection (C) provides that "[t]he Commission must certify the eligibility of institutions seeking contracts pursuant to this section." Even though Subsection (C) of Section 2-77-20 does insure that all eligible institutions will receive some monies, specifying that one half of the appropriated funds will be divided equally among eligible institutions, this does not mean there is any grant involved. It is evident from the Bill's language, as well as purpose, that the legislation requires that all funds awarded pursuant to the Program must be provided as part of a contract with the Commission on Higher Education.

Third, as we read the Bill, not only must all Program funds be provided to eligible institutions solely by virtue of contracts with CHE, but such funds must be awarded exclusively for those purposes specified in Section 2-77-30(A)(1) through (10). Subsection (A) states that "[f]rom amounts appropriated by the General Assembly, the commission must enter into contracts with eligible institutions that are certified by the Commission for any of the following uses ... ." Of course, a statute must be read as a whole and the sections thereof as part of the same statutory scheme and each part thereof must be construed as one. State v. Morgan, 352 S.C. 359, 574 S.E.2d 203 (Ct. App. 2002). Thus, while Subsection (D) of § 22-7-20 provides that portions of the funds awarded to an eligible institution on an equal basis, must first use the funds "as the nonfederal match required by a federal funding program that provides funding for historic preservation or for capital improvements," those funds may, nevertheless, be used only for the purposes specified in § 2-77-30(A)(1) through 10.

In other words, the Bill requires that these public funds may be used only for those "capital improvements" which are specified in Section 2-77-30(A). Examples of this would be contained in Subsections (1), (2) and (4) of this Section. The General Assembly has clearly contemplated that the purpose of this legislation is for the primary benefit of "low-income and educationally disadvantaged students," not to provide a direct benefit to the institutions themselves. The permissible uses specified in § 2-77-30(A) are all clearly for the primary benefit of students at the institution rather than the school itself. For example, a contract with CHE for such capital improvements as the construction or renovation of an administration building or a physical plant, or other uses such as salaries or current operating expenses are not within the uses specified in the statute and could not be approved by that agency. On the other hand, the purchase of laboratory equipment, books, periodicals, etc. or the construction or renovation of classrooms would be within those authorized purposes. Thus, a contract with CHE only for those purposes authorized by § 2-77-30 could be consummated.

We turn now to the question of whether S.203 violates Article XI, § 4 of the South Carolina Constitution. Clearly, use of lottery funds as required by the proposed statute would constitute "public funds." See, Op. S.C. Atty. Gen., January 7, 2003; Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967) [to constitute public funds, "it does not matter whether the money is derived by ad valorem taxes, by gift or otherwise."].

Therefore, the issue here is whether the proposed Bill's expenditure of public funds in the manner specified would constitute a "direct benefit" to a "private educational institution." The background and case law surrounding adoption of Article XI, § 4 is set forth at length in the January 7, 2003 opinion. There, we recognized the following, quoting therefrom:

> The present Article XI, § 4 was substantially altered by constitutional amendment in the form of a vote of the people in 1972 and ratification by the General Assembly in 1973. Formerly, the constitutional provision existed as Article XI, § 9 which provided in pertinent part that
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> > [t]he property or credit of the State of South Carolina ..., or any public money, from whatever source derived shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used, directly or indirectly, in aid or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or in part under the direction or control of any church or of any religious or sectarian denomination, society or organization.
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> In Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971), this predecessor provision was applied by our Supreme Court to the question of the constitutionality of an Act of the Legislature which provided tuition grants to students attending independent institutions of higher learning in South Carolina. The Hartness Court noted that at least 16 of the 21 independent institutions of higher learning "are operated under the direction or control of religious groups or denominations." Id. Accordingly, in the view of the Hartness Court, such aid violated then existing Art. XI, § 9. The Court's reasoning was reflected as follows:
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> > [w]e reject the argument that the tuition grants provided under the Act do not constitute aid to the participating schools. Students must pay tuition fees to attend institutions of higher learning and the institutions depend upon the payment of such fees to aid in financing their operations. While it is true that the tuition grant aids the student, it is also of material aid to the institution to which it is paid. The fact that only a portion of the tuition costs are covered by the grants from the state affects the matter only in degree. If State funds can be used to provide a portion of the tuition costs for attendance at religious schools, all could just as legally be paid, resulting in the support of such institutions entirely with State funds.
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> 179 S.E.2d at 908.

The next year, the Court decided Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), concluding in that case that an Act of the Legislature authorizing the Budget and Control Board as the State Education Assistance Authority to make, insure or guarantee loans to students to defray their expenses at institutions of higher learning. This legislation did not violate then Art. XI, § 9, the Court held. Referencing its earlier decision in Hartness, which Durham found was, based upon the facts, "inevitable," the Court distinguished Hartness this way:

> [i]n this case, the emphasis is on aid to the student rather than to any institution or class of institutions. All which provide higher education, whether public or private, sectarian or secular, are eligible. The loan is to the student, and all eligible institutions are as free to compete for his attendance as though it had been made by a commercial bank. This is aid, direct or indirect to higher education, but not to any institution or group of institutions. Even if it were conceded that the loan fund is public money within the meaning of Article XI, Section 9, it would require a strained construction to hold that participation by students attending Wofford, Furman, and like institutions, as well as by those attending the University of South Carolina, Clemson University and the like, offends this constitutional restriction. However, we think it clear that the student loan fund under the Act is held by the Authority as a trust fund, and that no public money or credit, within the meaning of Article XI, Section 9, is employed in making or guaranteeing loans. Cf. Elliott v. McNair, 250 S.C. 75, 90, 156 S.E.2d 421, 429 (1967).

192 S.E.2d at 203-204. Thus, in dicta, at least, the Durham Court carved out an exception to Hartness, i.e. where all students attending South Carolina's various institutions of higher learning, "whether public or private, sectarian or secular" are treated similarly, the State Constitution was not violated.

Following the Hartness and Durham decisions, the Constitution was amended by a vote of the people in 1972. The scope of new Article XI, § 4 was made much narrower than the former provision contained in Art. XI, § 9. In Op. Atty. Gen. No. 3687 (January 4, 1974), we summarized the contrast between the former and new provisions:

> [a] comparison of the amended version and the original provision, contained in Article XI, Section 9, reveals that the amended version is much less restrictive in prescribed connections between the State and private religious educational institutions, to wit: Section 4 no longer contains a prohibition against the "property" of the State being used in aid of any religious or sectarian institution. Likewise, the word

> "indirectly," referring in the original provision to the use of State property, credit or money in aid of religious or sectarian institutions, has been deleted from the amended Article XI, Section 4.

Examination of the Final Report of the Committee to Make a Study of the South Carolina Constitution of 1895 (1969) [West Committee] is particularly enlightening as to the intent of the framers in transforming former Article XI, § 9 into present day Art. XI, § 4. The distinction which the framers sought to create between permitting the use of public funds to assist students, who themselves choose to attend private institutions of higher education, and prohibiting the government subsidization of those same private colleges is readily apparent in the West Committee's Final Report. This distinction was made by the Committee through the following comments:

> [t]he Committee fully recognized the tremendous number of South Carolinians being educated at private and religious schools in this State and that the educational costs to the State would sharply increase if these programs ceased. From the standpoint of the State and the independence of the private institutions, the Committee feels that public funds should not be granted outrightly to such institutions. Yet, the Committee sees that in the future there may be substantial reasons to aid the students in such institutions as well as in state colleges. Therefore, the Committee proposes a prohibition on direct grants only and the deletion of the word "indirectly" currently listed in Section 9. By removing the word "indirectly" the General Assembly could establish a program to aid students and perhaps contract with religious and private institutions for certain types of training and programs .... Report, at 100-101. (emphasis added).

Thus, the framers of Art. XI, § 4, the people who voted for the amendment, as well as the General Assembly which ratified it, drew the line of demarcation between a violation and non-violation of the provision as being dependent upon whether the particular aid primarily benefits the student or the institution itself. With that in mind, we have concluded that such expenditures of public funds as tuition grants, the [lending] of textbooks to students, and the [lending] of films to schools are primarily for the benefit of students. Such assistance, therefore, is not deemed to be a "direct benefit" to a "private educational institution." See, Op. Atty. Gen., June 5, 1973 ([lending] of money to South Carolina students to attend out-of-state sectarian institutions); Op. Atty. Gen., Op. No. 94-14 (February 2, 1994) [tuition grants]; Op. Atty. Gen., Op. No. 3683 (January 4, 1974) [[lending] of department of Education films to parochial schools denominational colleges and private schools]; Op. Atty.

> Gen., Op. No. 83-40 (July 12, 1983) [[lending] of textbooks to six predominantly black colleges].

If the primary beneficiaries of the public funds are the students themselves rather than the institutions, then the State Constitution would not be violated.

The foregoing January, 2003 opinion considered and rejected one argument which might have salvaged the constitutionality of the appropriation reviewed therein. We noted that it was at least arguable that the Legislature, in appropriating funds to historically black colleges and universities in South Carolina, was constitutionally justified in providing "sufficient public funding in terms of maintenance and repairs of South Carolina's historically black colleges in order to further educational opportunities for all South Carolina citizens." We stated that

> [f]ederal law authorizes federal funds to be paid to historically black colleges for the "construction, maintenance, renovation and improvement" of classrooms, libraries and other facilities. See 20 U.S.C.A. § 1062. Congressional purpose in enacting the federal law was to "strengthen historically black colleges and universities" by authorizing the federal Department of Education to provide money grants to those schools. See, U.S. v. Fordice, 505 U.S. 717, 760, 112 S.Ct. 2727, 120 L.Ed.2d 575 (1992). The Congressional findings contained in the federal legislation note that congress desired to use grants to these institutions as a 'remedy of Black post secondary institutions to ensure their continuation as participation in fulfilling the Federal mission of equality of educational opportunity ...." 20 U.S.C.A. § 1060 .... [I]t could possibly be argued in defense of a challenge [to the statute in question] ... that the General Assembly's purpose was to aid educational opportunity in South Carolina as opposed to the particular schools themselves. See, Op. Atty. Gen., Op. No. 83-40 (July 12, 1983) [[lending] of textbooks to six predominantly black colleges is not unconstitutional].

However, ultimately we rejected the foregoing argument because, in our view, there was "no indication whatsoever that the General Assembly intended primarily to aid students at all institutions of higher education as opposed to appropriating funds directly to private colleges." Id.

Such is not the case, however, with S.203. By contrast, this legislation is neutral on its face. The proposed Bill neither expressly singles out private or sectarian institutions of higher learning, but focuses more specifically upon the makeup of an institution's student population. As noted above, an "eligible institution" is defined simply as "a four year institution of higher learning at which sixty percent or more of the enrolled undergraduate students are low-income and educationally disadvantaged students." In precise terms, this would mean any institution in which sixty percent of the student population received a Pell Grant would be eligible for the South Carolina Higher Education Excellence Enhancement Program. Therefore, while the term "eligible institution" may, at present, only be applicable to certain colleges and universities in South Carolina, the Bill could

conceivably apply to any institution of higher learning – public or private, secular or sectarian, depending upon the economic circumstances then governing. This fact is significant in determining the legislation's constitutionality. See, Timmons v. S.C. Tricentennial Comm., 254 S.C. 378, 175 S.E.2d 805 (1970). [fact that legislation might apply only to certain cases is not determinative of constitutionality where neutral on its face].

We must also recognize, of course, in any determination of the constitutionality of legislation, that our courts consider not only the form of an Act, but the effect and the practical operation thereof as well. Martin v. Condon, 324 S.C. 183, 478 S.E.2d 272 (1996). Even a statute which is neutral on its face, may have a particular effect which renders the law unconstitutional. Id.

At the same time, it must be noted that our Supreme Court has repeatedly recognized it will afford deference to the findings made by the General Assembly as to a statute's public purpose and applicability, particularly where such findings are detailed and comprehensive. See, Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953); Carll v. S.C. Jobs-Econ. Dev. Auth., 284 S.C. 438, 327 S.E.2d 331 (1985); Anderson v. Baehr, 265 S.C. 153, 217 S.E.2d 43 (1975).

In this instance, the Bill provides such "detailed and comprehensive findings" by the General Assembly. Carll, supra. The Legislature finds that it is "a significant part of the state mission in education" to "enhance excellence in higher education for low-income and educationally disadvantaged students." Moreover, the General Assembly finds that public educational assistance made available to those institutions serving a high proportion of low-income and educationally disadvantaged students will provide "a direct educational benefit to the students by improving the overall quality of their educational experiences by offering enhanced facilities and improved academic instruction." The goal of South Carolina Higher Education Excellence Enhancement Program is, according to the legislative findings, to maximize the federal funding of the institutions of higher learning which typically serve low-income and educationally disadvantaged students. In the words of the General Assembly,

> it is necessary that the State of South Carolina enable these institutions to effectively partner with the federal government to ensure the continued existence in this State of these institutions which provide a substantial public benefit to the State by enabling these targeted students to be well-educated, to move into the workforce and to improve the quality of life in South Carolina.

In short, the Bill finds that improvement in the facilities and available resources of institutions which primarily serve low-income and educationally disadvantaged students will improve the "overall quality of their educational experiences." In essence, the Legislature's purpose and emphasis here "is on aid to the student rather than to any institution or class of institutions." Durham v. McLeod, supra, 192 S.E.2d at 203-204. The General Assembly's avowed and express intent in the enactment of S.203 is to improve the quality of higher education for all "low-income and educationally disadvantaged students" in South Carolina. This contrasts with the legislation we

reviewed in the January, 2003 opinion. There, the General Assembly simply appropriated funds directly to South Carolina's historically black colleges.

Notwithstanding the Legislature's stated purpose in the Bill, the question remains whether S.203 has the effect of using public funds to provide a "direct benefit" to any "religious or other private educational institution." We note that the centerpiece of the proposed South Carolina Higher Education Excellence Enhancement Program is the authority provided to the Commission on Higher Education to contract with eligible institutions to provide the use of funds specified in Section 2-77-30. Included are the purchase of scientific and laboratory equipment, maintenance and improvement of classrooms and libraries, purchase of library books and other educational materials, provision of student counseling and tutoring as well as "establishing or enhancing a program of teacher education designed to qualify students to teach in a public elementary or secondary school in the State." To summarize, the General Assembly appropriates lottery funds to authorize the Commission to contract with eligible institutions for the foregoing services and purposes. Again, all such funds would be awarded by virtue of contracts with CHE and all funds would be required to be used only for the purposes specified in Section 2-77-30 and for no other purpose. Even those funds which would be used as part of the non-federal match monies for historic preservation or capital improvements could be used only for the purposes designated in Section 2-77-30.

An opinion dated September 27, 1995, is also relevant here. In that opinion, we scrutinized the use of State funds as part of a contract between the State and Converse College to provide the South Carolina Institute of Leadership for Women (SCIL) program. State funds were appropriated to the Citadel through the Appropriations Act and then disbursed to Converse for performance of its obligations under the contract in that instance.

Our conclusion was that the contract not only served a public purpose, but that it did not contravene Article XI, § 4. As to the latter concern, we recognized that a contract between the State and a private college or university was constitutionally distinguishable from a direct appropriation. In our view, while such a contract undoubtedly provided some benefit to the private school, such was an indirect benefit only, and the direct benefit was on behalf of an independent public purpose. There, we stated:

> [o]ur Supreme Court, as well as this Office have often concluded that the State may constitutionally utilize a private, nonprofit corporation to serve a valid public purpose. As we noted in Op. Atty. Gen., December 18, 1979, the Supreme Court case of Bolt v. Cobb, 225 S.C. 408, 82 S.E.2d 789 (1954) "recognizes the validity of appropriation of public funds for the performance of a public function through the agency of a nonprofit, nonsectarian entity which provides health services, welfare services and other public purposes for which appropriations may be made." See also, Op. Atty. Gen. No. 85-81 (August 8, 1985) [state contracting with a private entity to perform a state function, i.e. providing a correctional facility]. Here, Converse College is clearly a nonsectarian entity.

In addition, we referenced general authority which concludes that "constitutional provisions limiting or prohibiting public aid being extended to private institutions of higher learning ... do not prohibit the State from doing business [with] or contracting with private universities in fulfilling a governmental duty and furthering a public purpose." (citing, 14A C.J.S., Colleges and Universities, § 7.) Specifically, we cited a case decided by the Supreme Court of Nebraska, State ex rel. Creighton University v. Smith, 217 Neb. 682, 353 N.W.2d 267 (1984).

In Smith, a statute authorized the State Director of Health to make grants and contracts with any medical school in the State for cancer research. Contract funds would be used for the payment of salaries of personnel participating in the contract project. However, the Nebraska Constitution stated that appropriation of public funds could not be made to any school or institution of learning not owned or exclusively controlled by the state ...." The Attorney General of Nebraska concluded that this constitutional prohibition precluded contracts being awarded to private schools such as Creighton.

However, the Nebraska Supreme Court ruled that whatever benefit the contract bestowed upon Creighton was indirect rather than direct. The Court noted that the Nebraska Constitution "does not prohibit the state from doing business or contracting with private institutions in fulfilling a governmental duty and furthering a public purpose." While, concluded the Court, "[s]ome might contend that [in] a state-contracted program of cancer research the Legislature is doing indirectly what it cannot do directly ...," such a conclusion was contrary to "common sense and the Constitution ...." 353 N.W.2d at 272. In the Court's view,

> [w]e do not rule out the possibility that Creighton may derive an indirect benefit from a research contract with the state, but possible indirect benefit does not transform payments for contracted services into an appropriation of public funds proscribed by article VII, § 11 of the Nebraska Constitution. Benefit is distinguished from purpose. The primary purpose and principal objective of the state's contract regarding cancer research is improved public health in Nebraska. In the case before us, public funds are used for a public purpose - the promotion and search for good health as a benefit to all citizens of Nebraska, simultaneously related to the function of state government.

Importantly, in the Court's opinion, the Act in question "does not set aside state money for Creighton's special use and does not vest in Creighton any right to receive state funds." Id. Accordingly, the Court concluded that the statute in question was constitutional.

Similarly, in Father Flanagan's Boys Home v. Dept. of Social Services, 255 Neb. 303, 583 N.W.2d 774 (1998), the Nebraska Supreme Court upheld the validity of a statute requiring the state to pay for educational costs of state wards when placed in a school district other than the district in which the student resided. It was contended that payment of the state of funds pursuant to a contract with a nonpublic school violated the provision of the Nebraska Constitution, referenced above.

However, the Nebraska Supreme Court disagreed, relying upon State ex rel. Creighton v. Smith, supra. The Court held that

> [h]ere, there has been no appropriation of public funds to FFBH. Instead, a state agency has exercised its discretionary authority to contract for services necessary to fulfill a governmental duty and further a public purpose, namely the state's duty to obtain a nonsectarian education for its wards. The fact that a nonpublic institution derives a benefit from the contract "does not transform payments for contracted services into an appropriation of public funds proscribed by Article VII, § 11 of the Nebraska Constitution." [quoting, Smith, supra 353 N.W.2d at 272].

See also, Pa. Assn. of State Mental Hosp. Physicians v. Commonwealth, 63 Pa. Cmwlth. 307, 437 A.2d 1297, 1300 (1981) ["It is our legal conclusion that the contract, while certainly not ruling out the possibility that MCP might benefit therefrom, has as its primary purpose the rendering of and payment for services performed by MCP in operating and managing EPPI]. Contra, Bd. of Trustees of Leland Stanford Junior University v. Cory, 79 Cal.App.3d 661, 145 Cal.Reptr. 136 (1978) [Court holds that contract between state and private colleges is, in reality, a "grant" and thus violative of California Constitution]. These authorities draw a clear distinction between a contract between the State and a private educational institution and an outright gift or grant from the State to such private institutions.

Moreover, at least three opinions of this Office have concluded that a particular statute or expenditure of public funds does not violate Article XI, § 4 of the South Carolina Constitution where there is established a primary independent public purpose as opposed to a "direct benefit" provided to a private educational institution. In an opinion dated June 5, 1973, we concluded that in light of the 1973 constitutional amendment, referenced above,"the South Carolina Constitution no longer contains a prohibition against indirect benefit, in the form of tuition payments to South Carolina students, to sectarian schools." In that opinion, the practice of lending money to students who are South Carolina residents but who attend out-of-state sectarian institutions was deemed constitutional.

In Op. No. 3687 (January 4, 1974), we found that the practice of lending films to private educational institutions was valid under Article XI, § 4. Moreover, in Op. No. 83-40 (July 12, 1983), former Attorney General Medlock concluded that State Desegregation funds could be spent, consistent with Article XI, § 4, to purchase textbooks for the use by students enrolled in private colleges in South Carolina. The textbooks distributed to the private colleges were to be used primarily by the six in-state historically black colleges and universities. We concluded that neither the Establishment Clause of the First Amendment nor Article XI, § 4 were violated by the plan. In our opinion, the purchase was "primarily for the valid secular purposes of education, health care and desegregation." Any "direct benefit" from the plan was to the students of South Carolina and the public at large. We concluded:

> [t]he benefit to the colleges in contrast to the students affected, would here appear to be merely indirect and the public benefit would greatly outweigh any incidental private gain. See, 78 C.J.S., Schools and School Districts, § 5, pp. 612-613; see, Article Sections 11, Constitution of South Carolina, as amended.

While none of these opinions involved contracts per se, they are important in any analysis of the present situation. The foregoing opinions stress the importance for purposes of Article XI, § 4 that there be a "direct benefit" to students as well as the public at large in contrast to a "direct benefit" to the private educational institution.

We note that the proposed Bill here is similar to the statute which was upheld by the Nebraska Supreme Court in the Creighton University v. Smith case, discussed above. S.203 is neutral in form, making no distinction between the types of institutions eligible for funding pursuant to contract. In other words, the Bill does not distinguish between public or private institutions, but only is concerned with whether the particular institution has an enrollment of more than 60% of its students who receive Pell Grants. The proposed legislation's goal is the assistance of low-income, economically disadvantaged students, just as the Nebraska law upheld in Smith was designed to improve the public health rather than to benefit a particular medical school. While the Nebraska constitutional provision reviewed in Smith is certainly not identical to South Carolina's Article XI, § 4, it is similar. It is also striking that the Nebraska Supreme Court in Smith found that legislation similar to S.203 bestowed no more than an "indirect benefit" on the private school involved.

Moreover, the Legislature's findings incorporated as a part of S.203 make it clear that the General Assembly's intent is to benefit primarily low-income educationally disadvantaged students in South Carolina as well as the public at large by improving higher education in the State. While, undoubtedly, the colleges themselves will benefit, low-income students will be the ultimate and principal beneficiary. As our Supreme Court stressed in Hunt v. McNair, 255 S.C. 71, 177 S..E.2d 362, 366 (1970), the ability of a college "to provide education to its students is inseparable from its fiscal welfare." In our opinion, the Legislature's findings, being entitled to great weight, are – and likely would be held to be – reasonable in this instance.

In addition, the fact that S.203 establishes a system of contracts with eligible institutions is also constitutionally significant. As we recognized in our September 27, 1995 opinion relating to the State's proposed contract with Converse College, any contract between the State and a private college provides at most an indirect benefit to that institution. While it is true that half of the funds involved in the Program must be distributed equally among the eligible institutions, again, these funds must be awarded pursuant to contracts with the Commission on Higher Education and must meet the designated uses specified in the Bill. Of course, it is well recognized that the Legislature may consider public benefits to the community as a measure of consideration for any contract. See, Burkhardt v. City of Enid, 771 P.2d 608 (Okl. 1989); Nichols v. S.C. Research Auth., 290 S.C. 415, 351 S.E.2d 155 (1986); McKinney v. City of Grville., 262 S.C. 227, 203 S.E.2d 680, 688 (1974). ["a public body may properly consider indirect benefits resulting to the public in determining what

is a fair and reasonable return for disposition without running afoul" of the Constitution."] Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 546 (1923) [grant by city on condition that grantee erect a hotel does not violate State Constitution; city may consider public benefit which may result from grant]. Here, the Legislature has found that such contracts benefit students primarily and the eligible institutions only secondarily. The other one half of the funds involved are distributed as part of the exercise of the Commission on Higher Education's discretion, again, pursuant to contract between the CHE and the eligible institution. Thus, based upon the foregoing analysis, a court would probably conclude that S.203 is constitutional.

Impact of Lottery Amendment to Article XVII, § 7

There is one additional argument which a court might rely upon to sustain the constitutionality of S.203. The recently approved amendment to Article XVII, § 7 authorizing a state lottery provides for the manner in which lottery funds may be expended. Article XVII, § 7 provides in pertinent part that "[e]ducation Lottery Account proceeds may be used only for education purposes as the General Assembly provides by law."

In the construction of constitutional amendments the court applies rules similar to the interpretation of statutes. McKenzie v. McLeod, 251 S.C. 226, 161 S.E.2d 659 (1968). Of course, it is well recognized that all sections of the Constitution must be considered together and harmonized, if possible. Lee v. Clark, 224 S.C. 138, 77 S.E.2d 485 (1953). As a general matter, specific laws prevail over general laws and laws later in time take precedence over earlier. Lloyd v. Lloyd, 295 S.C. 55, 367 S.E.2d 153 (1988). Here, the General Assembly as well as the voters were presumed to be cognizant of the limitations of Article XI, § 4 which was last amended in 1973 when the Lottery amendment was adopted in 2000. Yet, on its face, the only limitation placed upon the expenditure of lottery funds by Article XVII, § 7 is that such expenditure be for "educational purposes as the General Assembly provides by law." No reference is made to any other limitation such as that contained in Article XI, § 4. Thus, a court could conclude that Article XVII, § 7 is controlling in this situation, thereby sustaining the constitutionality of this legislation.

The South Carolina Supreme Court has adopted a similar analysis in another context involving education. In Bradley v. Cherokee School District No. One of Cherokee County, 322 S.C. 181, 470 S.E.2d 570 (1996), the Court reiterated its holding in Moye v. Caughman, 265 S.C. 140, 217 S.E.2d 36 (1975) that Article XI, § 3, which authorizes the General Assembly to provide for the maintenance and support of a system of free public schools and to support such other systems of public learning, dictates that the ordinary limitations of Article III, § 34 relating to special legislation generally do not apply in situations involving education matters. In Moye and Bradley, the Court construed Article XI, § 3 in conjunction with Article III, § 34 to carve out certain exceptions to the prohibition against special legislation. While we need not address the meaning of "educational purposes" in the application of Article XVII § 7 in other contexts, we believe that this constitutional provision certainly reinforces the constitutionality of S.203. Where, as here, unlike the previous legislation addressed in our January 2003 opinion, this legislation imposes safeguards consistent with

the requirements that there be no outright grants of public funds to private educational institutions, a court could conclude that Article XVII, § 7 sustains this legislation. A reasonable reconciliation of Article XI, § 4 with Article XVII, § 7 is that legislation must primarily benefit students rather than private schools. In view of the fact that the Legislature has concluded that S.203 primarily benefits low-income, educationally disadvantaged students, rather than the schools themselves, a court could uphold the Bill as constitutional.

CONCLUSION

With the caveats expressed herein, it is our opinion that S.203 would likely be upheld by a court as constitutional. As we discuss more fully above, this Bill possesses a number of important distinctions from the legislation which we reviewed in our January, 2003 opinion in which we concluded that the appropriation in question there would not likely pass constitutional muster.

Here, the Legislature has, in no uncertain terms, expressed that the purpose of this Bill is to assist low-income, educationally disadvantaged students, rather than providing direct aid to colleges and universities. The General Assembly has made clear findings in support of that overarching purpose. Moreover, the Bill requires that all funds appropriated for the South Carolina Educational Excellence Enhancement Program must be distributed to eligible institutions pursuant to contract with the Commission on Higher Education and may be provided only for the purposes specified in Section 2-77-30. Courts have recognized that contracts are constitutionally distinguishable from outright grants and those uses specified in Section 2-77-30 have been found by the Legislature to benefit low-income, educationally disadvantaged students primarily. Even the one-half portion of the funds which would be equally divided among eligible institutions must be distributed pursuant to contract and may not be awarded for any purpose not specified in the Act. These requirements, mandated by the Bill, represent a reasonable effort by the Legislature to comply with the mandate of Article XI, § 4. Based upon these important distinctions, and given the presumption of constitutionality which must be afforded the Bill if enacted into law, in our opinion, a court would thus uphold the Bill.

In addition, a court could sustain the legislation on the additional ground that Article XI, § 4 must be read in conjunction with Article XVII, § 7 which governs the manner in which Lottery Account proceeds must be expended. Thus, the Court could conclude the constitutionality of S.203 is reinforced by the fact that Article XVII, § 7 imposes no other limitation upon the expenditure of lottery funds than that these funds must be used for "education purposes as the General Assembly provides by law." A reasonable reconciliation of Article XI, § 4 with Article XVII, § 7 would be that the legislation must primarily benefit students, and in view of the findings of the General Assembly that this is the case, a court could conclude that the expenditure of these lottery funds is a proper "educational purpose" consistent with Article XVII, § 7.

We emphasize, however, that we are not without certain reservations, as expressed above. As the Court recognized in Durham v. McLeod, if the aid is directly to the student rather than the

school itself, there would likely be no constitutional problem. Here, the Legislature is authorizing contracts with eligible institutions, many of which would be private, rather than direct grants to those schools. Thus, a much closer constitutional question is raised. At least one court has concluded that the State's designation of monies provided to a private school as a "contract" does not immunize the applicable statute from unconstitutionality. See, Bd. of Trustees v. Cory, supra. Thus, the legislation must be read so as to give it a constitutional rather than an unconstitutional interpretation.

Accordingly, our conclusion that the Bill, if enacted, likely would pass constitutional muster is contingent upon strict compliance with the General Assembly's requirements set forth in the legislation itself. For example, funds could not be used as a non-federal match for any ordinary capital improvement such as renovating an administrative building or constructing a physical plant, but could be used only for the purposes set forth in the Bill, such as purchasing books or films or constructing laboratories or classrooms. The constitutional guidepost for compliance with Article XI, § 4 is that the expenditure must primarily benefit the student and not the institution. Durham v. McLeod, supra. The nearer an expenditure approaches the line which makes the school rather than the student the principal beneficiary, the more likely a court would be to conclude that the expenditure is constitutionally impermissible under Article XI, § 4. The Bill itself seeks to impose safeguards which insure that constitutional requirements are met. There must be strict compliance therewith.

Given these caveats, however, and assuming strict compliance with the Bill, as outlined herein, it is our opinion that the Bill would likely be upheld by a court.

Yours very truly,

Henry McMaster

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